

BellSouth Corporation
Suite 900
1133-21st Street, NW
Washington, DC 20036-3351

glenn.reynolds@bellsouth.com

Glenn T. Reynolds
Vice President -
Federal Regulatory

202 463 4112
Fax 202 463 4142

June 7, 2004

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform, WC Docket No. 03-157; Joint Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Platform, WC Docket No. 03-189

Dear Ms. Dortch:

This letter provides further comments on an *ex parte* presentation made by AT&T on February 25, 2004 ("AT&T *Ex Parte*") in connection with Verizon's petition for forbearance from the UNE-P pricing rules. While Verizon provided a response to the AT&T *Ex Parte* and BellSouth concurs in Verizon's response, nevertheless, because of the importance of the pending petition and the fact that BellSouth, in a joint petition with SBC and Qwest, asked for the same relief as requested by Verizon, BellSouth believes that these additional comments are warranted.

At the outset, the Commission should be mindful of the genesis of the forbearance requests. The petitions established that the dramatic decline in investment in the telecommunications industry and the devaluation of the nation's telecommunications infrastructure could be attributed in large part to the application of TELRIC pricing rules to

UNE-P. The data and analyses submitted with the petitions, much of which was national in nature, showed that the application of TELRIC pricing to UNE-P produces a system of uneconomic arbitrage by grossly understating ILEC costs while providing huge margins for UNE-P carriers.

While TELRIC, as constituted, is a flawed methodology, the problems with TELRIC are particularly acute when it is applied to UNE-P. Verizon and BellSouth have shown that the conditions for forbearance have clearly been met: (1) application of UNE pricing rules to UNE-P is not necessary to insure that charges are just and reasonable and are not unreasonably discriminatory; (2) enforcement of UNE pricing rules for UNE-P is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.

The AT&T *Ex Parte* reasserts the contention that the petitions for forbearance are barred by Section 10(d) of the Act,¹ which provides that “the Commission may not forbear from applying the requirements of Section 251(c) or 271 . . . until it determines that those requirements have been fully implemented.” This argument reflects both a statutory misinterpretation of Section 10(d) as well as a misapprehension of the relief sought in the forbearance petitions.

As an initial matter, the petitions do not request the Commission to exercise its forbearance authority with respect to Section 251(c). Instead, the petitions seek forbearance with respect to specific regulations and decisions that the Commission has implemented with respect to UNE-P, namely (1) the current TELRIC pricing rules and (2) the decision permitting UNE-P carriers (rather than the ILEC) to collect per-minute access charges from interexchange carriers. Nothing in BellSouth’s petition sought relief from the Section 251 unbundling requirements of

¹ 47 U.S.C. § 160(d).

Section 251 or the pricing standard principles set forth in Section 252 (to which there is a reference in Section 251). The forbearance request focused on the unique and severe harm arising from the application of specific rules (*i.e.*, TELRIC and the access charge pricing rule) that the Commission adopted and applied to UNE-P. Nothing in Section 251 or anywhere else in the Act requires either the application of TELRIC pricing to UNE-P or that ILECs forgo access charges on UNE-P arrangements.²

The AT&T *Ex Parte* reprises AT&T's claim that the requirements of Sections 251(c) and 271 include the Commission's implementing regulations. AT&T's theory was fully debunked in the Reply Comments submitted by BellSouth and the other joint petitioners.³ Section 10(d) only applies to the statutory requirements of Sections 251(c) and 271, not the implementing regulations.

The AT&T *Ex Parte* also suggests that the relief requested by the petitions could not be accomplished through forbearance, but instead would necessitate a rulemaking. AT&T is mistaken. The petitions for forbearance request forbearance from specific applications of the Commission's rules—not a modification of those rules. Granting the forbearance petitions would not result in a rule replacement or a promulgation of a new rule. The statutory pricing requirement that UNEs be priced at cost plus profit would continue to apply to discrete UNEs. The same statutory provision would permit UNE-P, which is the functional equivalent of resale, to be priced at the same price as the resale arrangements. Similarly, if the Commission forbears from applying Section 51.309(b) of its rules, the collection of access charge for UNE-P lines

² Indeed, the Supreme Court has found that the Commission's pricing rules are matters that the statute leaves to the Commission's discretion. *See Verizon v. FCC*, 535 U.S. 467, 495 (2002).

³ *See Reply of Joint Petitioners*, WC Docket Nos. 03-189 & 03-157 (filed Oct. 7, 2003).

would operate in a manner similar to the process governed by Section 51.617(b) applicable to services.

As the petitions for forbearance demonstrated, the pernicious effects of application of an inappropriate TELRIC methodology to establishing prices for UNE-P warrants the Commission's elimination of the fiction that a UNE-P carrier provides exchange access services to originate or terminate long distance services, and its forbearance from enforcement of the current rule allowing UNE-P carriers to collect per-minute access charges. The fact is that a UNE-P carrier simply acts as a marketer of local services provided using an incumbent's network. The incumbent continues to provide exchange access for the origination and termination, and transport of long distance calls. Indeed, in the case of exchange access service, a UNE-P carrier does not even engage in marketing access services as it does with local service. Access charges were designed to help pay for the underlying network infrastructure, and determining that the incumbent, as the underlying facilities provider, is entitled to the per-minute access charges would ensure that the underlying network provider receives the payments that were intended to support the ongoing operation and maintenance of the network.

Contrary to AT&T's *Ex Parte*, permitting incumbents to assess per-minute access charges on interexchange carriers would not result in the incumbent double-recovering its costs. Indeed, Verizon's *ex parte* dated May 20, 2004 in WC Docket No. 03-157 clearly addresses why there is no double recovery of switching costs. BellSouth agrees with Verizon's conclusion that there is no double recovery. Although BellSouth's UNE cost study methodology is different from Verizon's methodology, like Verizon, the per-minute UNE switching and shared transport rates approved by BellSouth's state commissions are based on cost studies that recognize all minutes of use on the facilities, both local and access. Thus, BellSouth's forbearance request

would not result in any increase in the CLECs' MOU UNE switching charge. Since the CLECs would no longer pay MOU UNE charges for minutes relating to access, the CLECs would actually see a decrease in overall UNE-P costs.

Currently BellSouth does not perform switched access cost studies. -As a price cap carrier, there has been no need for BellSouth to conduct a switched access cost study. BellSouth has not performed an interstate switched access cost study since adopting price cap regulation and has not conducted intrastate switched access cost studies since 1995.

Finally, BellSouth's intrastate Carrier Common Line (CCL) access charges mirror the interstate charges with three exceptions. In North Carolina and Tennessee, the state commissions have maintained the high cost fund surcharge and intrastate telecommunications relay service adjustment as part of the carrier common line. The Carrier Common Line charge remains in Florida as required by state statute. BellSouth is only seeking to collect the per-minute access charges related to switching and does not intend to collect the CCL from IXC's when it collects access charges in connection with UNE-P customers.

BellSouth agrees in particular with Verizon that there is no merit to AT&T's assertion that the ILECs would over-recover the fixed cost of the switch if they were to collect per-minute access charges on UNE-P lines where the CLEC continues to pay the flat-rated UNE port rate. AT&T implies that some of the fixed costs that are recovered in the UNE port rate are recovered in the per-minute access charges. *See AT&T Ex Parte*, Attachment at 4. However, the FCC specifically removed all non-traffic sensitive costs, including the line ports, from the per-minute switching access rate to the Carrier Common line basket.⁴ In the *AT&T Ex Parte*, Attachment at

⁴ See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213 & 95-72, *First Report and Order*, 12 FCC Rcd 15982, 16035-36, 16037, 16039-40, ¶¶ 125-27, 129, 134 (1997) ("First Calls Order"), *aff'd sub nom. Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998).

4, AT&T uses an example of UNE tariffs for switching collecting roughly 50% of total switching cost through fixed port charges and 50% through per-minute rates. By contrast, AT&T states that interstate access tariffs generally collect 90% of the interstate switching cost through per-minute rates and only about 10% through common line rates. AT&T's example does not make sense for BellSouth. In BellSouth's Access Reform Compliance Tariff Filing, Transmittal 465, dated June 16, 1998, BellSouth's data show that the revenue effect of the non-traffic sensitive line port switching revenue transferred to carrier common line was approximately 33% of the revenues. The foundation of the FCC's common line adjustment is based on the Switching Cost Information System ("SCIS") model that is the same model used for UNEs. UNE cost studies that the state commissions have adopted show approximately the same split between non-traffic-sensitive and traffic-sensitive costs. Clearly BellSouth is not double-recovering its UNE MOU switching costs.

Granting the petitions for forbearance would be an important first step in correcting the inequities that exist around the current application of TELRIC to UNE-P. While BellSouth is encouraged by the Commission's rulemaking to correct and reform the TELRIC methodology, the prospect of relief in the future does not negate the importance and need for immediate remedial action. The petitions for forbearance present the proper vehicle for the Commission to grant the necessary relief.

Sincerely,



Glenn T. Reynolds